

1 ROB BONTA  
Attorney General of California  
2 JEFFREY T. FISHER  
Supervising Deputy Attorney General  
3 ZEWUGEBERHAN DESTA  
Deputy Attorney General  
4 State Bar No. 271740  
1515 Clay Street, 20th Floor  
5 P.O. Box 70550  
Oakland, CA 94612-0550  
6 Telephone: (510) 879-0263  
Fax: (510) 622-2270  
7 E-mail: Zewugeberhan.Desta@doj.ca.gov  
*Attorneys for Defendants*  
8 *Allison, Broomfield, and Clark*

9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
11 SAN JOSE DIVISION

13 **MICHAEL V. NICKERSON,**

14 Plaintiff,

15 v.

16 **RON BROOMFIELD, et al.,**

17 Defendants.

No. 5:20-cv-06326-EJD (PR)

**DEFENDANTS' NOTICE OF MOTION  
AND MOTION TO DISMISS AND  
MOTION FOR SUMMARY JUDGMENT  
(EXHAUSTION); MEMORANDUM OF  
POINTS AND AUTHORITIES**

Judge: The Honorable Edward J. Davila  
Trial Date: Not Set  
19 Action Filed: September 9, 2020

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**NOTICE OF MOTION AND MOTION**

TO PLAINTIFF MICHAEL V. NICKERSON, PRO SE:

PLEASE TAKE NOTICE that under Rule 56 of the Federal Rules of Civil Procedure, Defendants Allison, Broomfield, and Clark (Defendants) move this Court for summary judgment on the grounds that Plaintiff failed to exhaust available administrative remedies before filing suit, as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e (a).

PLEASE TAKE FURTHER NOTICE that Defendants also move to dismiss this action under Rule 12(b)(6) because: (1) Defendants are entitled to qualified immunity; (2) Defendants are immune under the PREP Act; and (3) the Complaint fails to allege any cognizable Section 1983 claim.

This motion is based on this notice; the following memorandum of points and authorities; the accompanying *Rand* notice, exhibits, and declarations of witnesses; the request for judicial notice; all papers on file in this action; and any other matters properly before the Court.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**INTRODUCTION**

Plaintiff Michael V. Nickerson, a state prisoner housed at San Quentin State Prison, brings this action against Defendants Allison, Broomfield, and Clark. Plaintiff alleges that Defendants violated his Eighth Amendment rights when other inmates were transferred from CIM to San Quentin on May 30, 2020, allegedly causing him to contract COVID-19.

The Court should dismiss this action for four reasons: (1) Nickerson did not exhaust his administrative remedies prior to filing this lawsuit; (2) Defendants are entitled to qualified immunity; (3) Defendants are immune under the Public Readiness and Emergency Preparedness (PREP) Act, 42 U.S.C. § 247d-6d, *et seq.*; and (4) the operative complaint fails to state a claim for deliberate indifference to safety.

**PLAINTIFF'S ALLEGATIONS AND CLAIMS**

Plaintiff Nickerson alleges that Defendants violated his Eighth Amendment rights by being deliberately indifferent to unsafe conditions at San Quentin. Specifically, Nickerson alleges that on May 31, 2020, Defendants improperly transferred 121 inmates from CIM to San Quentin.



(ECF No. 9 at 3.) Nickerson states that some of these transferred inmates were known to be positive for COVID by both prisoners and medical staff. (*Id.*) Nickerson also alleged that Defendants “were aware of the dangers and San Quentin being inadequate to keep inmates safe due to old unventilated buildings, no PPE and room for social distance, no testing protocols in place, and overcrowding.” (*Id.*) Nickerson further alleges that “prison officials did not act until inmates started dying,” and that his requests for “PPE” and release from prison were denied. (*Id.* at 4.) Nickerson alleges that he eventually tested positive for COVID after experiencing headaches, problems breathing and sleeping, sore joints, and swollen legs. (*Id.*)

## RELEVANT JUDICIALLY NOTICEABLE FACTS

### I. CDCR’S HEALTH CARE SYSTEM IS IN FEDERAL RECEIVERSHIP.

In 2006, the court in *Plata v. Davis*, N.D. Cal. No. 01-cv-01351, appointed a federal Receiver, and conferred on the Receiver “all the powers vested by law in the Secretary of the [CDCR] as they relate to the administration, control, management, operation, and financing of the California prison medical health care system,” and suspended CDCR’s exercise of those powers. *Hines v. Youseff*, 914 F.3d 1218, 1223 (9th Cir. 2019); *see also Plata v. Schwarzenegger*, 603 F.3d 1088 (9th Cir. 2010); (Defs.’ Req. Judicial Notice (RJN), Ex. A). Therefore, since 2006, state officials have made decisions about prison medical care while under the supervision of the federal Receiver, who was appointed to ensure compliance with the Eighth Amendment. *Id.*

### II. SUMMARY OF CDCR’S COVID-19 RESPONSE AND THE TRANSFER OF INMATES FROM CIM TO SAN QUENTIN.

CDCR began its COVID-19 policy development in late February 2020, when it became apparent that the virus had spread into the United States and could pose a risk to CDCR inmates. *Plata v. Newsom*, 445 F. Supp. 3d 557, 562 (N.D. Cal. Apr. 17, 2020.). The *Plata* Receiver and CDCR implemented several measures intended to mitigate the risks associated with COVID-19 within the prisons, including reducing the inmate population, transferring inmates out of dormitory housing to less crowded spaces, restricting movement, eliminating mixing of inmates from different housing units, canceling visitation, distributing informational materials to inmates, ordering additional hand sanitizing stations, and placing six-foot markers in communal areas.

1 *Plata*, 445 F. Supp. 3d at 562, 567. CDCR also activated “a centrally-located command center  
 2 where CDCR and the Receiver’s experts monitor information, prepare for known and unknown  
 3 events, and exchange information centrally” to quickly make decisions and provide guidance. *Id.*  
 4 As the pandemic evolved, CDCR also suspended transfers between facilities and screened all  
 5 individuals entering prisons for known COVID-19 symptoms. *Id.*

6 Additionally, on April 10, 2020, the Receiver issued “Guidelines for Achieving and  
 7 Maintaining Social Distancing in California Prisons.” *Plata*, 445 F. Supp. 3d at 565; (RJN Ex. C).  
 8 The guidelines required that inter-institution transfers be approved by the “Health Care Placement  
 9 Oversight Program (HCPOP) in consultation with the CCHCS<sup>1</sup> public health team” because such  
 10 transfers “risk carrying the virus from one institution to another.” *Plata*, 445 F. Supp. 3d 557,  
 11 565; (RJN Ex. C). Two days later, the Receiver issued a supplemental memo clarifying that his  
 12 April 10 directive was not intended “to affect any inter-institution transfers that are to address  
 13 either medical, mental health, or dental treatment needs that are not available at the sending  
 14 institution, such as to provide a higher level of care or to reduce or prevent morbidity or mortality,  
 15 or a safety or security issue that cannot be managed by the sending institution.” *Plata*, 445 F.  
 16 Supp. 3d at 565; (RJN Ex. D). Under these guidelines, hundreds of inmates were moved out of  
 17 dormitory housing to available spaces in other prisons to achieve greater physical distancing.  
 18 *Plata*, 445 F. Supp. 3d at 563. Furthermore, by mid-April 2020, California’s Prison Industry  
 19 Authority was producing cloth barrier masks for inmates and staff at a rate of approximately  
 20 22,000 per day. *Plata*, 445 F. Supp. 3d 567.

21 Throughout all of this, the *Plata* court monitored CDCR’s COVID-19 response at frequent  
 22 Case Management Conferences. *See generally Plata v. Newsom*, 01-CV-01351-JST (N.D. Cal.  
 23 2001); *Plata*, 445 F. Supp. 3d at 569.

24 Despite CDCR’s efforts, the first inmate tested positive for COVID-19 on March 20, 2020.  
 25 (RJN, Ex. E at 58-59.) CIM was the first CDCR institution to experience a large outbreak. (RJN,  
 26 Ex. F at 11-12.) CIM’s outbreak posed significant risks to the inmate population there because

27 \_\_\_\_\_  
 28 <sup>1</sup> The Receiver heads CCHCS. *See* <https://cchcs.ca.gov/wp-content/uploads/sites/60/NR/execOrgchart.pdf>  
 (last visited on December 22, 2021.)

1 most, if not all, of CIM inmates were housed in dormitories. (*Id.*) According to the *Plata*  
 2 Plaintiffs, “[c]rowded indoor rooms, such as dormitories with poor ventilation, are prime  
 3 environments for the spread of the infection,” which in early- to mid-2020 they believed “spread  
 4 through droplet transmission.” (RJN, Ex. I at 2.) At that time, it “was not yet clear that the virus  
 5 could survive and spread in an aerosolized form.” (RJN, Ex. F at 12.) Initially, the outbreak at  
 6 CIM remained confined to a few dorm facilities, and the *Plata* court believed CDCR’s strategy of  
 7 sheltering inmates in place at CIM was working. *Plata*, 445 F. Supp. 3d at 563. But the *Plata*  
 8 plaintiffs still demanded to transfer more inmates out of dorm settings. *Id.*

9 Then, the outbreak spread to “a previously unaffected dorm housing a large number of  
 10 older, COVID-19 high-risk patients.” (RJN, Ex. F at 12.) The question facing the Receiver at that  
 11 point was **“whether to leave those patients where they were—even though they were at an**  
 12 **increasing risk of contracting COVID-19—or to transfer those patients to a safer**  
 13 **institution.”** (*Id.* (emphasis added).) The *Plata* plaintiffs demanded that CDCR transfer these  
 14 inmates out of CIM. (RJN Ex. G at 4, 10; Ex. H at 10–11, 14; and Ex. I at 2–3.)

15 On May 23, 2020, faced with a growing outbreak that had spread to every housing unit at  
 16 CIM, and pressure from the *Plata* plaintiffs, “the Receiver, in consultation with the Secretary,  
 17 directed that high-risk inmates at CIM who test negative for COVID-19 be transferred to facilities  
 18 in institutions that remained COVID-19 free.” (RJN, Ex. E at 60:11-61:16, Ex. I.) The decision  
 19 “involved a balancing of the growing risks to the CIM patients against the risks of any large scale  
 20 transfer.” (RJN, Ex. E at 59.) The Receiver “notified CDCR that 691 high-risk inmates at CIM  
 21 tested negative for COVID-19 and should be transferred out.” (RJN, Ex. I at 14.) At the time,  
 22 CCHS’s protocols for inmate transfers stated: “COVID screen and test if patient is to transfer.  
 23 May transfer if COVID screen and test negative.” (RJN, Ex. F at 12.) But the protocol did not  
 24 specify how soon inmates needed to be tested before a transfer. (*See id.*) That was consistent with  
 25 guidance from the U.S. Centers for Disease Control and Prevention, which likewise had no pre-  
 26 transfer testing timeline. (RJN, Exs. B, N.) The Centers recommended “perform[ing] verbal  
 27 screening and a temperature check” in case of necessary inmate transfers. (*Id.*) But the Centers’  
 28

guidance did not recommend testing immediately before a transfer, nor did it recommend that the verbal or temperature screening occur within a set period of time before the transfer. (*Id.*)

Accordingly, 122 medically-vulnerable inmates were transferred from CIM to San Quentin on May 30, 2020. (ECF No. 30 at 7.) All of the inmates had a negative COVID-19 test, but “many of the inmates who were transferred from CIM had tests that were two, three, and even four weeks old” because, as noted above, the existing protocols did not require testing within a specific amount of time. (RJN, Ex. F at 13, Ex. E at 60, Ex. J at 9, n.5.)

Because of the emergent outbreak, CCHCS also approved an increase in the number of inmates who could be put in each bus for this transfer. (RJN, Ex. L (OIG Report)). Though each bus could accommodate up to 38 inmates, to improve social distancing, CDCR had limited the number of inmates per bus to 19. (*Id.* at 38-39.) For this transfer, however, CCHCS approved increasing that number to 25 (still only 65% capacity), so long as the CIM inmates were from the same dorm and tested negative for COVID-19 before the transfer. (*Id.*) CCHCS’s guidance from May 22, 2020, also did not require protective quarantine for inmates awaiting test results before or after the transfer. (*Id.* at 34.)

About a week after the transfer of the 122 inmates from CIM to San Quentin, the Receiver issued a new “testing and transfer strategy” dictating that “a patient should not transfer if the date of their negative test was seven or more days prior to the date of transfer. (RJN Ex. K at 11-14.)

### **III. THE PUBLIC READINESS AND EMERGENCY PREPAREDNESS (PREP) ACT PROVIDES IMMUNITY DURING PUBLIC HEALTH EMERGENCIES.**

Fifteen years before COVID-19 emerged, Congress enacted the PREP Act. Under the PREP Act, the Secretary of the U.S. Department of Health and Human Services (HHS) may issue a Declaration in response to a public health emergency, which immunizes certain individuals and entities from suit under federal and state law for all claims of loss “caused by, arising out of, relating to, or resulting from” the administration of a “covered countermeasure” during the public health emergency. 42 U.S.C. § 247d-6d(a)(1) & (b); *see also Garcia v. Welltower OpCo Grp. LLC*, 522 F. Supp. 3d 734 (C.D. Cal. Feb. 10, 2021.).

1 In March 2020, the HHS Secretary issued a declaration invoking this broad immunity for  
 2 covered persons tasked with the administration of COVID-19 screening and testing, PPE,  
 3 mechanical ventilation, and other countermeasures necessary to treat and mitigate the spread of  
 4 COVID-19. *See Decl. Under the PREP Act for Medical Countermeasures Against COVID-19*, 85  
 5 Fed. Reg. 15198-01. The HHS Secretary has since amended the Declaration seven times, and the  
 6 HHS's Office of General Counsel has issued advisory opinions, elaborating on the PREP Act's  
 7 immunity to program planners who must make managerial and operational decisions about the  
 8 use of COVID-19 countermeasures. *See* 85 Fed. Reg. 79191; 86 Fed. Reg. 14462; (RJN Ex. M).

#### 9 **IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES.**

##### 10 **A. The California Inmate-Grievance Process.**

11 Under title 15, section 3481(a), of the California Code of Regulations, an inmate may  
 12 appeal any departmental decision, action, condition, or policy that has a material adverse effect on  
 13 the inmate's health, safety, or welfare. Cal. Code Regs., tit. 15 § 3481(a) (2020); (Decl. Bell  
 14 Supp. Defs.' Mot. Summ. J. (Bell Decl.) ¶ 4.) To initiate the grievance process, an inmate must  
 15 submit an Inmate/Parolee Appeal Form, commonly known as a 602 inmate grievance, within  
 16 thirty calendar days of the event or decision being appealed. Cal. Code Regs., tit. 15, §§ 3482(b)–  
 17 (d). In the original CDCR Form 602, the inmate must specify each claim and the relief requested,  
 18 and name all involved staff members and describe their alleged conduct. *Id.* at § 3482(c)(2).

19 The grievance process in 2020—the timeframe relevant to Nickerson's complaint—  
 20 consisted of two levels of review: (1) the institutional-level review conducted by the Institutional  
 21 Office of Grievances (no officer ranking lower than a Chief Deputy Warden); and (2) the  
 22 director's-level review conducted by the Office of Appeals in Sacramento, California (no officer  
 23 ranking lower than the Associate Director of Appeals). Cal. Code Regs. tit. 15, §§ 3481(a)–(b).  
 24 (Bell Decl. ¶ 5.) A substantive decision by the Office of Appeal exhausts all available  
 25 administrative remedies. Cal. Code Regs. tit. 15, §§ 3483(m), 3485. (Bell Decl. ¶ 6.) A grievance  
 26 that is not pursued through the final level of review does not exhaust administrative remedies, *id.*  
 27 § 3486(m), unless the issue under appeal was fully resolved at a lower level of review, *id.*  
 28 § 3483(m)(2). (Bell Decl. ¶ 6.)

**B. Nickerson Identified One Grievances Regarding His Claims.**

Nickerson alleges that he submitted inmate grievance log number 08563 regarding his claims, but the grievance was “never answered by the Office of Appeals.” (Pl.’s Am. Compl., ECF 9, at 1–2.) Nickerson contends that he did not finish the exhaustion process because of “staff not answering appeals in a timely fashion.” (*Id.* at 2.) In his original complaint, Nickerson stated that he submitted grievances log number 08563, on June 25, 2020, and he was notified by the Office of Grievances that he would be given a response by August 25, 2020. (ECF No. 1 at 1, 4.) Nickerson insists that, under the prison’s regulations, his grievance should have been responded to within 30 working days; and, based on that assumption, Nickerson surmised that the grievance process was unavailable to him. (*Id.*) Nickerson is incorrect. Under the regulations, the Office of Grievances has 60 calendar days, after receipt of the grievance, to provide written response. *See* Cal. Code Regs. tit. 15, §§ 3483(i).

**C. Nickerson’s Grievance Number 08563.**

Nickerson submitted grievance number 08563 for institutional-level review on June 25, 2020. (Bell Decl. ¶ 19.) In this grievance, Nickerson complained that his health and safety was endangered because of the transfer of inmates from CIM to San Quentin, and also because of the lack of social distancing, lack of protective equipment, and lack of programming. (Bell Decl. ¶ 19, Ex. C.) He also complained that “the mere fact [he was] being held in a confined space in a national pandemic with communal feeding [was] harm caused by CDCR.” (*Id.*) Nickerson further complained that inmates who tested positive for COVID-19 were sent to administrative segregation, rather than being sent to the hospital or given other care. (*Id.*) For relief, Nickerson requested “to be given adequate protective gear . . . , some form of outside recreation, a reduction of the population to adequately social distance, a better way of handling those who test positive, or have high temperature, and a release from the prison industrial complex.” (*Id.*)

The same day, on June 25, 2020, the Office of Grievances at San Quentin sent Nickerson a letter acknowledging receipt of his grievance. (ECF No. 1 at 4; Bell Decl. ¶ 19.) In the letter, Nickerson was advised that the Office of Grievances will complete its review of the grievance no later than August 25, 2020. (*Id.*) On August 20, 2020, the Office of Grievances at San Quentin

disapproved the grievance. (Bell Decl. ¶ 19, Ex. C.) On August 21, 2020, the Office of Grievances' decision was sent to Nickerson, and Nickerson was advised that he may appeal the decision to the Office of Appeals, if dissatisfied. (*Id.*) Nickerson did not appeal the Office of Grievances' decision to the final level of review. (ECF No. 9 at 2; Moseley Decl. ¶¶ 7–10.) Instead, he filed this lawsuit.

## LEGAL STANDARD

### I. LEGAL STANDARD FOR MOTION TO DISMISS.

Under Fed. R. Civ. P. 12(b)(6), a defendant may move to dismiss a complaint for failure to state a claim where: (1) the plaintiff fails to state a cognizable legal theory, or (2) the plaintiff alleges insufficient facts under a cognizable legal theory. *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). In ruling on a Rule 12(b)(6) motion, a court's review is limited to the contents of the complaint, including documents attached to the complaint, or documents the complaint necessarily relies on and whose authenticity is not contested. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). In addition, the court may take judicial notice of facts that are not subject to reasonable dispute. *Id.* at 688–689 (discussing Fed. R. Evid. 201(b)).

### II. LEGAL STANDARD FOR SUMMARY JUDGMENT BASED ON EXHAUSTION.

Summary judgment is appropriate “where there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The PLRA requires inmates to exhaust available administrative remedies before filing § 1983 lawsuits. 42 U.S.C. § 1997e(a). Unexhausted claims cannot be considered and must be dismissed. *McKinney v. Carey*, 311 F.3d 1198, 1200 (9th Cir. 2002) (per curiam); *Jones v. Bock*, 549 U.S. 199, 219–20 (2007). The exhaustion defense may be brought in a motion for summary judgment, and should be decided before reaching the merits of an inmate's claim. *Albino v. Baca*, 747 F.3d 1162, 1168, 1170 (9th Cir. 2014) (en banc). Defendants bear the burden of demonstrating that there was an available administrative remedy that the inmate did not exhaust. *Id.* at 1172. The plaintiff then has the burden of producing evidence showing that there is something in his particular case that made administrative remedies unavailable to him. *Id.* (citations omitted). If undisputed evidence shows a failure to exhaust, defendants are entitled to summary judgment. *Id.* at 1166. If the motion for



summary judgment is denied because of disputed factual questions relevant to exhaustion, then an *Albino* hearing should be held so that a judge can resolve those questions. *Id.* at 1170–71.

### ARGUMENT

#### **I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE NICKERSON FAILED TO EXHAUST HIS CLAIMS AGAINST THEM.**

Inmates are required to exhaust available administrative remedies before filing lawsuits regarding prison conditions, 42 U.S.C. § 1997e(a), and they must do so in accordance with the prison’s grievance requirements, *Jones v. Bock*, 549 U.S. 199, 220 (2007). Proper exhaustion requires “using all steps that the agency holds out, and doing so properly.” *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). And, as discussed above, pp. 6–7, *supra*, the state provides its prisoners with the right to administratively grieve any departmental decision, action, condition, or policy that has an adverse effect on their welfare. Cal. Code Regs. tit. 15, § 3481(a) (eff. June 1, 2020).

It is also required that exhaustion be complete before filing suit: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law . . . until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). And a complaint is “brought” when the prisoner submits it to the court, at which time a prisoner must have exhausted administrative remedies. *Vaden v. Summerhill*, 449 F.3d 1047, 1050 (9th Cir. 2006). A prisoner cannot exhaust *pendente lite*, or during the pendency of the litigation. *McKinney v. Carey*, 311 F.3d 1198, 1201 (9th Cir. 2002) (affirming dismissal of action for failure to exhaust when prisoner is in the process of exhausting administrative remedies when the dismissal motion was filed); *see also Vaden*, 449 F.3d at 1051 (“Because [plaintiff] did not exhaust his administrative remedies prior to sending his complaint to the district court, the district court must dismiss his suit without prejudice.”).

Here, Nickerson submitted only one inmate grievance (number 08563) that mentioned or complained about the transfer of COVID-positive inmates from CIM to San Quentin and the lack of social distancing, protective equipment, and programs. (ECF No. 1 at 4; ECF No. 9 at 3; Bell Decl. ¶ 19.) But this grievance does not exhaust Nickerson’s administrative remedies because it was not presented to the final level of review. (Bell Decl. ¶ 19; Moseley Decl. ¶ 7–10.) Nickerson



1 concedes that this grievance was not exhausted through the final level of review, but he contends  
 2 that the grievance process was unavailable to him because he did not receive a response to his  
 3 grievance within 30 working days. (ECF No. 1 at 1; ECF No. 9 at 2.) Specifically, Nickerson  
 4 states that he “did not go to the last levels due to staff not answering appeals in a timely fashion.”  
 5 (ECF No. 9 at 2.) Nickerson asserts that the institutional-level review to his grievance should  
 6 have been completed within “30 working days.” (ECF No. 1 at 1.)

7 But, as discussed above, Nickerson is incorrect. The relevant regulations provide that the  
 8 Office of Grievances has 60 calendar days from receipt of a grievance to respond. Cal. Code  
 9 Regs. tit. 15, §§ 3483(i). Nickerson submitted grievance number 08563 for institutional level  
 10 review on June 25, 2020. (Bell Decl. ¶ 19.) The same day, the Office of Grievances sent  
 11 Nickerson a letter acknowledging receipt of the grievance and advising Nickerson that the review  
 12 of his grievance will be completed no later than August 25, 2020. (ECF No. 1 at 4; Bell Decl. ¶  
 13 19.) On August 20, 2020, the Office of Grievances at San Quentin disapproved the grievance, and  
 14 the decision was sent to Nickerson the next day. (Bell Decl. ¶ 19, Ex. C.) Nickerson was also  
 15 advised that he may appeal the decision to the Office of Appeals, if dissatisfied. (*Id.*) Nickerson,  
 16 however, abandoned the grievance process and submitted his complaint in this action on August  
 17 25, 2020, the date that the Office of Grievances stated it would respond to his grievance. (ECF  
 18 No. 1 at 3, 7); *cf. Huizar v. Carey*, 273 F.3d 1220, 1223 (9th Cir. 2001). Therefore, Defendants  
 19 are entitled to judgment as a matter of law because it is undisputed that grievance number 08563  
 20 was timely processed by Office of Grievances at San Quentin, and Nickerson abandoned the  
 21 grievance and did not exhaust it through the final level of review.

## 22 **II. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.**

23 Even if Nickerson had properly exhausted his claims, however, qualified immunity would  
 24 bar them. Qualified immunity shields government officials from damages liability unless: (1) they  
 25 violate a federal statutory or constitutional right; and (2) that right was “clearly established” at the  
 26 time of the challenged conduct. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). The  
 27 first prong of the qualified-immunity inquiry is whether a constitutional right would have been  
 28 violated on the facts alleged. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). A determination in the

defendants’ favor on either question establishes immunity. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Courts may decide which prong of the analysis to address first, *Pearson*, 555 U.S. at 236–39, but are encouraged to begin with the second prong because it can be determined as a matter of law early in a case, *see Morales v. Fry*, 873 F.3d 817, 822–23 (9th Cir. 2017).

A right is “clearly established” only if the law is so clear that, under the particular circumstances the official faced, “every ‘reasonable official would understand that what he is doing’ is unlawful.” *Wesby*, 138 S. Ct. at 589 (quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011)); *see Morales*, 873 F.3d at 823 (emphasizing “every” reasonable official—not just “a” reasonable official—would understand the conduct was unlawful). To conduct this analysis, a court first defines the circumstances with which the defendants were confronted, then analyzes existing case law to determine whether controlling authority—or a robust consensus of persuasive authority—found a constitutional violation “under similar circumstances.” *Wesby*, 138 S. Ct. at 590–91. Qualified immunity thus “gives government officials breathing room to make reasonable but mistaken judgments” and “protects all but the plainly incompetent or those who knowingly violate the law.” *Messerchmidt v. Millender*, 565 U.S. 535, 546–47 (2012).

The plaintiff “bears the burden of showing that the right at issue was clearly established.” *Emmons v. City of Escondido*, 921 F.3d 1172, 1184 (9th Cir. 2019). The Ninth Circuit describes this inquiry as “highly contextualized” and “fact-intensive.” *Hamby v. Hammond*, 821 F.3d 1085, 1091 (9th Cir. 2016). Of course, “a plaintiff need not find a case with identical facts in order to survive a defense of qualified immunity; ..., one can imagine a situation where the officials’ conduct is so egregious that no one would defend it, even if there were no prior holding directly on point.” *Id.* at 1095. “But it should be equally obvious that the farther afield existing precedent lies from the case under review, the more likely it will be that the officials’ acts will fall within the vast zone of conduct that is perhaps regrettable but is at least arguably constitutional.” *Id.*

Here, Defendants are entitled to qualified immunity under *Saucier*’s first prong because Nickerson has not pled facts that, if true, evidence a constitutional violation. *See Iqbal*, 556 U.S. at 675–684 (defendants entitled to qualified immunity because plaintiff’s complaint was based on “bald” and “conclusory” allegations); *Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir. 2012)

1 (defendants entitled to immunity where complaint did not allege a “*specific* policy implemented  
2 by the Defendants or a *specific* event or events instigated by the Defendants”); pp. 18–20, *infra*.

3 Defendants are also entitled to qualified immunity under the second prong of *Saucier*  
4 because neither binding precedent nor a robust consensus of persuasive authority would have put  
5 every reasonable official on notice, in May and June 2020, that a particular COVID-19 response,  
6 which was directed by a court-appointed Receiver, would violate the Eighth Amendment. In two  
7 analogous cases, *Hines v. Youseff*, 914 F.3d 1218 (9th Cir. 2019) and *Rico v. Ducart*, 980 F.3d  
8 1292 (9th Cir. 2020), the Ninth Circuit found CDCR officials qualifiedly immune.

9 In *Hines v. Youseff*, the Ninth Circuit found CDCR officials qualifiedly immune because  
10 not “every reasonable official would [have understood] that exposing inmates to a heightened risk  
11 of Valley Fever violated the Eighth Amendment.” 914 F.3d at 1229-30. The Ninth Circuit based  
12 this decision at least in part on the fact that a “federal Receiver appointed by the federal court to  
13 assure Eighth Amendment compliance actively managed the state prison system’s response to  
14 Valley Fever.” *Id.* at 1231. And, because “the Receiver oversaw prison medical care and  
15 protective measures regarding Valley Fever, state officials could have reasonably believed that  
16 their actions were constitutional so long as they complied with the orders from the Receiver and  
17 the *Plata* court.” *Id.* The analysis applies equally here.

18 Similarly, in *Rico v. Ducart*, the Ninth Circuit held CDCR officials qualifiedly immune for  
19 the alleged improper implementation of Guard One suicide-prevention protocols, which were  
20 implemented as part of the remedial phase of the long-running *Coleman v. Newsom* class action.  
21 *Rico*, 930 F.3d at 1301-02. The *Rico* plaintiff alleged that floor officers performed the suicide-  
22 prevention checks in a manner that disrupted his sleep: officers caused extra noise by running up  
23 and down the metal stairs, using the Guard One equipment more loudly than necessary, and  
24 rushing through the checks. *Id.* But because the protocol itself was required by the federally-  
25 appointed *Coleman* special master, the Ninth Circuit held that an officer could have reasonably  
26 believed that complying with the *Coleman* court’s directive, even while making more noise than  
27 necessary, would not violate the Eighth Amendment. The court noted the difficult position facing  
28 the *Rico* defendants: “A reasonable guard could be uncertain whether it was better to rush to

1 complete checks—making more noise for a shorter period of time—or to more slowly complete  
 2 checks—making less noise for a longer period time.” *Id.* Even if the officers did, in fact, create  
 3 extra noise in conducting Guard One checks, they were entitled to qualified immunity because  
 4 their actions fell “within the vast zone of conduct that is perhaps regrettable but is at least  
 5 arguably constitutional.” *Id.* at 1303 (quoting *Hamby*, 821 F.3d 1095).

6 Like in *Hines* and *Rico*, a surrogate of the federal court—here, the *Plata* Receiver, as well  
 7 as the *Plata* court itself—supervised CDCR’s COVID-19 response. The *Plata* court expressed its  
 8 intention to—and did—continually monitor CDCR’s response to COVID-19, convening weekly  
 9 case management conferences during which the *Plata* plaintiffs reported on the growing outbreak  
 10 at CIM. *Id.* at 569; (RJN, Exhs. G-K). When the *Plata* court reviewed CDCR’s response up  
 11 through April 17, 2020, it found the response was consistent with the Eighth Amendment. *Plata*,  
 12 445 F. Supp. 3d at 562. Then, at the urging of the *Plata* plaintiffs, and the direction of the federal  
 13 Receiver, CDCR moved 122 medically vulnerable inmates from CIM to San Quentin. (RJN,  
 14 Exhs. Ex. E at 60:11-61:16, F at 13, I at 14.)

15 As in *Hines* and *Rico*, the decision to transfer those inmates, based on negative COVID-19  
 16 tests from prior weeks, was made under the direction of a federal Receiver. (*Id.*) The Receiver’s  
 17 then-existing protocols did not mandate how far in advance of the transfer the tests must be  
 18 conducted. (RJN, Ex. F at 13, Ex. E at 60, Ex. J at 9, n.5.) Nor did they require quarantining of  
 19 the inmates after transfer. (*Id.*) Under these circumstances, one cannot say that every reasonable  
 20 official would have known that following the directions of the Receiver, who was appointed to  
 21 ensure compliance with the Eighth Amendment, and transferring medically vulnerable inmates  
 22 out of CIM to protect them from COVID-19, would violate the Eighth Amendment.

23 Moreover, out-of-circuit authority supports the conclusion that an imperfect response to  
 24 COVID-19 in correctional settings is not inherently unconstitutional. *See Swain v. Junior*, 961  
 25 F.3d 1276, 1283-84 (11th Cir. 2020) (“a resulting harm cannot establish a culpable state of mind,”  
 26 and holding the entirety of the facility’s COVID-19 response was reasonable, despite response’s  
 27 failure to mitigate the spread of COVID-19); *Wilson v. Williams*, 961 F.3d 829, 841 (6th Cir.

2020) (Federal Bureau of Prisons’ response to COVID-19 demonstrated officials responded reasonably, despite the fact that six people died).

District courts also have not reached a broad consensus about whether the failure to take certain countermeasures, similar to those identified in Nickerson’s operative complaint, violate the Eighth Amendment. In *Kesling v. Tewalt*, 476 F. Supp. 3d 1077, 1087-88 (D. Idaho Aug. 4, 2020), the district court dismissed a plaintiff’s Eighth Amendment claim premised on the failure to issue masks and failure to isolate inmates pending COVID-19 test results, noting that “it would be impossible to isolate every inmate who would be potentially infected.” *Id.* In *Young v. Bonner*, No. 2:20-cv-02614-TLP, 2021 WL 4699089, at \*1 (W.D. Tenn. Oct. 7, 2021), the district court found no Eighth Amendment claim where prison officials “placed inmates from another facility into the pod without testing them” for COVID-19 in April 2020. Other courts have scrutinized more specific allegations about COVID-19 countermeasures and come to similar conclusions. *Garcia v. Los Angeles County*, No. 2:20-cv-08528-JVS-KES, 2021 WL 4497213, at \*4-5 (C.D. Cal. July 7, 2021) (dismissing deliberate indifference claims premised on “refusing to retest inmates who previously tested positive,” not providing adequate social distancing, and “not testing inmates coming into MCJ”); *Jones v. Lay*, 4:20-cv-1325-BRW-BD, 2021 WL 687342 (E.D. Ark. Jan. 25, 2021) (“reasonable correctional officials would not have known that allowing [plaintiff] to remain in a barracks [with other COVID-19 positive inmates] for six days after his negative test results was a violation of clearly established law”), *R. & R. adopted*, 2021 WL 686667 (Feb. 22, 2021); *Adam Lane ADC 155843 v. William Straughn, et al.*, No. 4:20-cv-01067-BRW-JTK, 2021 WL 5240179, at \*6 (E.D. Ark. Oct. 13, 2021) (“[A]t the time Plaintiff raised his concerns, there was no clearly-established right as to prison ventilation and COVID-19 protocols.”), *R. & R. adopted*, 2021 WL 5239973 (Nov. 10, 2021); *Freemen v. United States*, No. 2:20-13341-KM, 2021 WL 4129479, at \*3-4 (D.N.J. Sept. 9, 2021) (inmate with bronchitis and asthma who cleaned COVID-19 transport van with inadequate masks and gloves did not state an Eighth Amendment claim). That these district court opinions address allegations that arose in the early months of the pandemic shows that what constitutes an Eighth Amendment violation is still in the process of “becoming established.” *Sorrels*, 290 F.3d at 971. As these opinions show, no

1 existing precedent would have placed Defendants on fair and clear notice, in May 2020, that their  
2 conduct might violate the Constitution.

3 Because existing precedent did not recognize the unconstitutionality of this particular  
4 response to the COVID-19 pandemic, the allegations fall “within the vast zone of conduct” that is  
5 at least arguably constitutional. *Hamby*, 821 F.3d at 1095. Even if more could have been done, the  
6 *Plata* court noted in April 2020 that “the Eighth Amendment does not afford litigants and courts  
7 an avenue for a *de novo* review of the decisions of prison officials.” *Plata v. Newsom*, 445 F.  
8 Supp. 3d at 569 (citing *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1132 (N.D. Ill. 2020)). “Nor  
9 does the failure to eliminate all risk establish that the Government was deliberately indifferent.”  
10 *Hope v. Warden, York City Prison*, 972 F.3d 310, 330 (3rd Cir. 2020). In hindsight, additional or  
11 heightened measures could have been taken, but no robust consensus of authority would have put  
12 Defendants on notice that, in these circumstances, where a burgeoning outbreak threatened the  
13 lives of 122 medically vulnerable inmates, the failure to take additional measures violated the  
14 Eighth Amendment. Defendants are therefore entitled to qualified immunity.

### 15 **III. DEFENDANTS ARE ALSO ENTITLED TO IMMUNITY UNDER THE PREP ACT.**

16 The PREP Act authorizes the HHS Secretary to issue a Declaration immunizing certain  
17 individuals and entities from suit under federal and state law for all claims of loss “caused by,  
18 arising out of, relating to, or resulting from” administration or use of a “covered countermeasure”  
19 during a health emergency. 42 U.S.C. § 247d-6d(a)(1) & (b). “Once the [HHS] Secretary has  
20 issued a declaration, the PREP Act provides sweeping immunity for certain claims against certain  
21 individuals.” *Garcia*, 522 F. Supp. 3d at 739. Here, Defendants are immune under the PREP Act  
22 because Nickerson’s allegations show that Defendants are “covered persons” and that his injuries  
23 arose out of the administration of “covered countermeasures.”

#### 24 **A. Defendants, as Program Planners, Are “Covered Persons.”**

25 A “covered person” is a “program planner” of a covered countermeasure, or “an official,  
26 agent, or employee” of a program planner. 42 U.S.C. § 247d-6d(i)(2)(B). A “program planner,” in  
27 turn, is a state or local government or their employee who supervised or administered a program  
28 concerning the administration, dispensing, provision, or use of a countermeasure, and who



1 establishes requirements, provides policy guidance, or supplies technical advice or assistance, or  
 2 provides a facility to administer or use countermeasures. (RJN Ex. N.)

3 Defendants Allison and Broomfield were allegedly “aware of the [COVID-19] dangers,”  
 4 but failed to provide “PPE, and . . . testing” to Nickerson. (ECF No. 9 at 3.) Since COVID-19  
 5 tests and other countermeasures necessary to treat and mitigate the spread of COVID-19, such as  
 6 PPE, are covered countermeasures under the PREP Act, Defendants’ alleged role in providing  
 7 policy guidance and establishing requirements for COVID-19 testing and PPE distribution  
 8 establish that Defendants were “program planners,” and thus covered persons. *See Decl. Under*  
 9 *the PREP Act for Medical Countermeasures Against COVID-19*, 85 Fed. Reg. 15198-01.

10 **B. Plaintiffs’ Alleged Loss Arises Out of the Administration of Covered**  
 11 **Countermeasures.**

12 Nickerson’s loss arose out of Defendants’ administration of covered countermeasures. First,  
 13 countermeasures include items such as COVID-19 testing, PPE, respirators, mechanical  
 14 ventilation, thermometers, and face shields. 85 Fed. Reg. 15202; *see also* The Coronavirus Aid,  
 15 Relief and Economic Security Act (CARES) § 3103, Pub. L. No. 116-136 (March 27, 2020).

16 Second, “administration” means either 1) “physical provision of countermeasures”;  
 17 2) “activities and decisions relating to public and private delivery, distribution, and dispensing of  
 18 the countermeasures to recipients”; or 3) “the management and operation of countermeasure  
 19 programs or management and operation of locations for purpose of distributing and dispensing  
 20 countermeasures.” 85 Fed. Reg. 15201. This last aspect of the definition applies even to claims  
 21 that do not relate directly to the countermeasure, “such as a slip-and-fall injury or a vehicle  
 22 collision by a recipient receiving a countermeasure at a retail store serving as an administration or  
 23 dispensing location that alleges, for example, lax security or chaotic crowd control.” *Id.*

24 The immunity also applies in “non-use” situations, such as where there is “prioritization or  
 25 purposeful allocation of a covered countermeasure, particularly if done in accordance with a  
 26 public health authority’s directive.” 85 Fed. Reg. 79197. When program planners decide how to  
 27 use or allocate available countermeasures (as opposed to simple nonfeasance or the failure to  
 28 obtain countermeasures *in toto*), they are entitled to immunity. *Id.*; (RJN Ex. N (“decision-making

that leads to the non-use of covered countermeasures by certain individuals is the grist of program planning, and is expressly covered by the PREP Act”)); *Garcia*, 522 F. Supp. 3d. at 745.

Nickerson directly connects his injuries to Defendants’ administration of countermeasures. (ECF No. 9 at 3.) Nickerson alleges that he did not receive a timely COVID-19 test and PPE, which are covered countermeasures. (*Id.* at 4.) Nickerson also alleges that he contracted COVID-19 after COVID-positive inmates were transferred from CIM to San Quentin. (*Id.*) The CIM-San Quentin transfer implicates the PREP Act’s immunity for “non-use” decisions. The transfer was a policy decision by the federal Receiver and CDCR officials in response to an active outbreak at CIM. (RJN, Exh. B.) Although Nickerson’s Complaint lacks particularized allegations as to what each Defendant did or failed to do, any decision to transfer the inmates from CIM to San Quentin, any decisions about when and how to test inmates, and prioritizing precautionary measures such as providing PPE for certain people, are exactly the kinds of non-use decisions that the PREP act immunizes. *See* Advisory Opinion 21-01; (RJN, Exh. N). Nickerson’s contracting COVID-19 arose out of alleged actions that the PREP Act shields from liability.

### **C. If Defendants Are Not Immune, This Court Lacks Jurisdiction.**

The sole exception to the PREP Act’s broad immunity is an exclusive federal cause of action for death or serious physical injury caused by willful misconduct. 85 Fed. Reg. 79198. But if Nickerson’s allegations meet that exception, the claim may only be brought in the United States District Court for the District of Columbia, not in this Court. *See* 42 U.S.C § 247d-6(e).

## **IV. NICKERSON’S ALLEGATIONS FAIL TO STATE A CLAIM FOR DELIBERATE INDIFFERENCE TO HIS SAFETY.**

To assert an Eighth Amendment claim for deliberate indifference to safety or prison condition, a prisoner must satisfy two requirements: one objective and one subjective. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Under the objective requirement, the prison official’s acts or omissions must be “sufficiently serious,” *i.e.*, they must deprive the plaintiff of the “minimal civilized measure of life’s necessities.” *Id.*; *Allen v. Sakai*, 48 F.3d 1082, 1087 (9th Cir. 1994).

Objectively, there is no Eighth Amendment violation so long as the institution “furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal



1 safety.” *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982) (internal quotations omitted). “To the  
 2 extent [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal  
 3 offenders pay for their offenses against society.” *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).  
 4 “[E]xtreme deprivations are required” to rise to the level of a constitutional violation. *Hudson v.*  
 5 *McMillian*, 503 U.S. 1, 8-9 (1992).

6 Here, Nickerson alleges that the “Warden and Director were aware of the [COVID-19]  
 7 dangers and San Quentin being inadequate to keep inmates safe due to old unventilated buildings,  
 8 no PPE, and room for social distance, no testing protocols in place, and overcrowding.” (ECF No.  
 9 9 at 3.) Nickerson claims that he tested positive for COVID-19 after “121 inmates were  
 10 transferred from Chino Prison, and that some were known to be positive for COVID by both  
 11 prisons and medical staff.” (*Id.* at 4.) Although COVID-19 is a serious health concern, Nickerson  
 12 does not allege any fact linking the transfer of inmates to San Quentin to his contracting of the  
 13 virus. (*See generally* ECF No. 9.) Nickerson does not allege that he was housed with any of the  
 14 transferred inmates, or even spent any time in the same cell, building, or facility as any of them.  
 15 (*Id.*) Nor does Nickerson allege that any of the Defendants were involved in the decision to  
 16 transfer the inmates from CIM, or how they were to be housed at San Quentin. (*Id.*) Nickerson  
 17 also does not allege that any of the Defendants denied him PPE. (*Id.*) Nickerson’s general  
 18 allegation that COVID-19 positive inmates were transferred to San Quentin and that his request  
 19 for PPE was denied, without more, does not show that any Defendant deprived him of the  
 20 “minimal civilized measure of life’s necessities.” Thus, Nickerson’s allegations in the Amended  
 21 Complaint do not meet the objective component for cruel and unusual punishment needed to  
 22 support a claim for deliberate indifference to safety, and this claim should be dismissed.

23 Besides the objective component, an inmate must also demonstrate that the prison officials  
 24 had a sufficiently culpable state of mind. *Farmer*, 511 U.S. at 837. “Deliberate indifference is a  
 25 high legal standard.” *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). “This is not an easy  
 26 test [] to satisfy.” *Hallett v Morgan*, 296 F.3d 732, 744-45 (9th Cir. 2002). Deliberate indifference  
 27 exists when a prison official “knows of and disregards an excessive risk to inmate health and  
 28 safety.” *Farmer*, 511 U.S. at 837. “The official must be both aware of facts from which the

1 inference could be drawn that a substantial risk of serious harm exists, and he must also draw the  
 2 inference.” *Id.* “It is *obduracy and wantonness, not inadvertence or error in good faith*, that  
 3 characterize the conduct prohibited by the” Eighth Amendment. *Wilson v. Seiter*, 501 U.S. 294,  
 4 299 (1991) (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)) (italics in original; internal  
 5 quotations omitted); see *LeMaire v. Maass*, 12 F.3d 1444, 1452 (9th Cir. 1993). When prison  
 6 officials confront considerable security constraints, “the ‘wantonness’ that must be established  
 7 consists of acting ‘maliciously and sadistically for the very purpose of causing harm.’” *LeMaire*,  
 8 12 F.3d at 1452 (quoting *Whitley*, 475 U.S. at 320–21).

9 Here, Nickerson’s Complaint lacks sufficient detail to establish that any Defendant had the  
 10 requisite culpable mental state. (See ECF No. 9.) Nickerson alleges no specific facts against any  
 11 of these Defendants that would show that any of them knew of and disregarded a substantial risk  
 12 to Nickerson’s safety. (See ECF No. 9.) With respect to Defendant Clark, Nickerson alleged  
 13 absolutely nothing except that he listed her as a defendant and stated that she was a “CEO [at]  
 14 San Quentin.” (*Id.* at 2.) Nickerson’s Amended Complaint does not show that Clark acted  
 15 maliciously and sadistically for the very purpose of causing harm to Nickerson. Similarly,  
 16 Nickerson’s general and conclusory allegations that “121 inmates were transferred from Chino  
 17 Prison, and that some were known to be positive for COVID by both prisons and medical staff”  
 18 (*id.* at 4), and that Defendants Allison and Broomfield “were aware of the [COVID-19] dangers  
 19 and San Quentin being inadequate to keep inmates safe due to old unventilated buildings, no PPE,  
 20 and room for social distance, no testing protocols in place, and overcrowding” (*id.* at 3), do not  
 21 show that these Defendants were involved in the alleged transfer from CIM to San Quentin or in  
 22 denying Nickerson PPE, much less that these Defendants acted maliciously and sadistically in  
 23 connection with the alleged transfer for the very purpose of causing harm to Nickerson. See  
 24 *George v. Diaz*, No. 20-cv-03244-SI, 2020 U.S. Dist. LEXIS 153581, \*10 (N.D. Cal. Aug. 24,  
 25 2020) (“The bare allegations of the existence of a disease and a desire to avoid contracting it  
 26 simply are not enough to state a claim against any defendant for deliberate indifference.”).

27 Nickerson’s Amended Complaint makes no effort to explain how each Defendant had the  
 28 required mental state for deliberate indifference. (See ECF No. 9.) Therefore, this action should

1 be dismissed for failure to state a claim. *See Robinson v. Broomfield*, No. 21-cv-00972-RMI,  
 2 2021 U.S. Dist. LEXIS 61148, \*6–7 (N.D. Cal. Mar. 30, 2021) (dismissing plaintiff’s claim that  
 3 he was infected with COVID-19 due to a transfer of inmates to San Quentin because plaintiff  
 4 failed to identify the actions or omissions of any specific defendant); *Fields v. CDCR*, No. 2:21-  
 5 cv-0548-EFB, 2021 U.S. Dist. LEXIS 67830 \*4–5 (E.D. Cal. Apr. 7, 2021) (dismissing plaintiff’s  
 6 claim that he was infected with COVID-19 after inmates from San Quentin and other prisons  
 7 were transferred to High Desert State Prison because it lacks sufficient detail to establish the  
 8 deliberate indifference of any defendant); *Cooper v. Allison*, No. 20-cv-09415 BLF, 2021 U.S.  
 9 Dist. LEXIS 83474 \*7, 10–12 (N.D. Cal. Apr. 28, 2021) (dismissing deliberate indifference claim  
 10 that inmates transferred from CIM to San Quentin were not tested for COVID prior to transfer  
 11 because plaintiff only presented conclusory allegations with little support, and failed to identify  
 12 the actions of each defendant and describe how each violated his constitutional rights).

### 13 CONCLUSION

14 As discussed above, Nickerson’s Amended Complaint is subject to dismissal because: (1)  
 15 Nickerson did not exhaust his administrative remedies before filing suit; (2) Defendants are  
 16 entitled to qualified immunity; (3) Defendants are immune under the PREP Act; and (4) the  
 17 operative complaint fails to state a claim for deliberate indifference to safety.

18 Dated: January 5, 2022

Respectfully submitted,

19 ROB BONTA  
 20 Attorney General of California  
 21 JEFFREY T. FISHER  
 Supervising Deputy Attorney General

22  
 23 /s/ Zewugeberhan Desta  
 24 ZEWUGEBERHAN DESTA  
 Deputy Attorney General  
 Attorneys for Defendants

25 SF2021401876  
 26 64793318  
 27  
 28

## CERTIFICATE OF SERVICE

Case Name: **M. Nickerson (F77522) v.  
Broomfield, et al.**

No. **5:20-cv-06326-EJD (PR)**

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I hereby certify that on January 6, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT (EXHAUSTION); MEMORANDUM OF POINTS AND AUTHORITIES; DEFENDANTS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS AND FOR SUMMARY JUDGMENT (EXHAUSTION); EXHIBITS A – N; DECLARATION OF HOWARD E. MOSELEY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (EXHAUSTION); EXHIBITS A – C; DECLARATION OF M. BELL IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (EXHAUSTION); EXHIBITS A – G; DECLARATION OF ZEWUGEBERHAN DESTA IN SUPPORT OF MOTION TO DISMISS AND FOR SUMMARY JUDGMENT; RAND WARNING; [PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT.**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On January 6, 2022, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Michael Vaugh Nickerson CDCR# F-77522  
San Quentin State Prison  
1 Main Street  
San Quentin, CA 94964  
In Pro Per

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on January 6, 2022, at Los Angeles, California.

D. Beltoya

Declarant

*/s/ D. Beltoya*

Signature

SF2021401876  
64789350